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IN THE
Supreme Court of the United States

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION NO. 46,

Petitioner,

v.

TRIG ELECTRIC CONSTRUCTION CO.; LYDIG CONSTRUCTION, INC.; FIDELITY AND DEPOSIT COMPANY OF MARYLAND; AND DEPARTMENT OF GENERAL ADMINISTRATION, STATE OF WASHINGTON,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Washington

MOTION FOR LEAVE TO FILE *AMICI CURIAE* AND BRIEF *AMICI CURIAE* OF THE TRUSTEES OF THE SOUTHERN CALIFORNIA IBEW-NECA PENSION TRUST FUND, IN SUPPORT OF PETITIONER

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Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Washington

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE*

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Trustees of the Southern California IBEW-NECA Pension Trust Fund (California Trustees) move for leave to file the attached brief *Amici curiae* in support of granting the petition for certiorari in this case.

The consent of the attorney for the petitioner has been obtained. The consent of the attorneys for each of the respondents was requested. Attorneys for Respondents Trig Electric, Lydig Construction and Fidelity Deposit Company of Maryland consented in writing. Attorneys for the Washington Department of General Administration have not responded.

The California Trustees are trustees of a multi-employer employee benefit fund. They are also fiduciaries and agents for collection of several other multi-employer employee benefit funds in the construction industry. They are currently responsible for collecting several million dollars of delinquent contributions due to those funds. The California Trustees rely upon the California equivalent of the lien, bond and stop notice remedies at issue in this Petition to collect those contributions. Whether or not they can continue to do so will have a significant impact on their ability to collect these contributions, which pay for benefits for tens of thousands of participants.

The California Trustees have a case pending before the Ninth Circuit Court of Appeals which presents precisely the same issue as here, preemption of state law bond and stop notice remedies by the Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1144, but as to the California equivalent of these laws: *Southern California IBEW-NECA Trust Funds, etc., et. al., v. Reliance Insurance Company, et. al.*, Ninth Circuit Docket No.s 99-55805, 99-55835 and 99-55954. That case has been argued and submitted, but no decision has been issued yet. They also have several cases pending in the trial courts involving the same issue.

The California Trustees wish to raise the following arguments which have not been adequately raised by the parties:

1) The Washington State laws at issue in this case are indistinguishable from similar laws in nearly all of the fifty states. The Circuit Courts and State Appellate Courts have come to conflicting decisions over whether these laws are preempted by ERISA, putting into doubt the ability to collect perhaps a Billion Dollars annually delinquent to multi-employer benefit plans in the construction industry.

2) Decisions, such as that of the Washington Supreme Court here, finding these centuries-old state remedies preempted by ERISA, should themselves be held preempted, as discriminating against ERISA plans and participants in the availability of creditors' remedies.

3) This would be an appropriate case for this Court to abandon the "relate to," "reference to," "connection with," and "alternative enforcement" formulas which have caused confusion in the lower courts, and instead return to the "field" and "conflict" preemption jurisprudence, as was historically applied under the Labor Management Relations Act, 29 U.S.C. § 185(a), and as Congress meant the courts to apply under ERISA.

Respectfully submitted,

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BRIEF *AMICI CURIAE* OF THE TRUSTEES OF THE SOUTHERN CALIFORNIA IBEW-NECA PENSION TRUST FUND, IN SUPPORT OF PETITIONER

INTEREST OF AMICI *

The Trustees of the Southern California IBEW-NECA Pension Trust Fund (California Trustees), *amici curiae*, urge that the Petition for a Writ of Certiorari to the Washington Supreme Court of International Brotherhood of Electrical Workers, Local Union No. 46 (Local 46) be granted.

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* Pursuant to Supreme Court Rule 37.6, *amici* state that none of the parties authored this brief in whole or in part and no one other than *amici* or undersigned counsel contributed money or services to the preparation or submission of this brief.

The California Trustees are trustees of a multi-employer employee benefit fund. They are also fiduciaries and agents for collection of several other multi-employer employee benefit funds in the construction industry.[1] They are currently responsible for collecting several million dollars of delinquent contributions due to those funds. In doing so, they rely on the California equivalent [2] of the Washington laws [3] which the Washington Supreme Court here declared preempted by the Employee Retirement Income Security Act (ERISA) § 514, 29 U.S.C. § 1144.

The same issue as here—whether these state law remedies are preempted by ERISA—is before the Ninth Circuit in a case in which the California Trustees and one of the parties here (Fidelity and Deposit Company of Maryland) are also party: *Southern California IBEW-NECA Trust Funds, etc., et. al., v. Reliance Insurance Company, et. al.*, Ninth Circuit Docket No.s 99-55805, 99-55835 and 99-55954. That case has been argued and submitted, but no decision has been issued yet. The California Trustees also have pending in the lower courts numerous other cases raising the same issue. The decision of this Court will clearly affect the outcome of these pending cases, and the ability of the California Trustees to effectively collect delinquent contributions paying for benefits for tens of thousands of participants.

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[1] These include the Southern California IBEW-NECA Health Trust Fund; IBEW Local 11 NECA Joint Apprenticeship and Educational Training Trust Fund; Riverside County Electrical Health and Welfare Trust Fund; Local Union 440-NECA Joint Apprenticeship and Educational Training Trust Fund; Orange County Electrical Industry Health and Welfare Trust Fund; Local Union 441-NECA Joint Apprenticeship and Education Training Trust Fund; Local Union 441 Credit Union; Local Union 477-NECA Joint Apprenticeship and Educational Training Trust Fund; National Electric Benefit Fund; and the National Electrical Industry Fund.

[2] Calif. Const. Art. XIV, § 3; Calif. Civ. Code §§ 3082-3267.

[3] Rev. Code Wash. §§ 39.08.010 and 60.28.010.

REASONS THE WRIT SHOULD BE GRANTED

I. THE STATE LAW REMEDIES FOUND PRE-EMPTED BY THE WASHINGTON SUPREME COURT ARE LEGALLY INDISTINGUISHABLE FROM REMEDIES IN NEARLY EVERY OTHER STATE, WHICH IMPACT PERHAPS A BILLION DOLLARS ANNUALLY IN DELINQUENT CONTRIBUTIONS FOR FRINGE BENEFITS IN THE CONSTRUCTION INDUSTRY

In the case below, a 5-4 majority of the Washington Supreme Court held that the Washington payment bond [4] and stop notice [5] remedies did not protect fringe benefit contributions along with other labor costs, because those laws are preempted by ERISA § 514, 29 U.S.C. § 1144. *International Brotherhood of Electrical Workers, Local Union No. 46 v. Trig Electric Construction Co.*, 142 Wash.2d 431, 13 P.3d 622 (2000) (hereafter "Trig"). In doing so, the *Trig* majority attempted to distinguish two Circuit Court of Appeal decisions [6] and one State Supreme Court decision [7] which came to the opposite conclusion. The majority also ignored at least four other Circuit Court of Appeal decisions contrary to its holding.[8]

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[4] Revised Code of Washington (RCW) § 39.08.010, *reprinted in* Petition at 2-3.

[5] RCW § 60.28.010, *reprinted in* Petition at 3-4.

[6] *Operating Engineers Health and Welfare Trust Fund v. JWJ Contracting Co.*, 135 F.3d 671, 676-79 (9th Cir. 1998) (AZ Payment Bond not preempted); *Greenblatt v. Delta Plumbing Corp.*, 68 F.3d 561 (2d Cir. 1995) (NY surety bond not preempted).

[7] *Board of Trustees of Operating Engineers Local 825 Fund v. L.B.S. Construction Co.*, 148 N.J. 561, 691 A.2d 339, *cert. denied*, 522 U.S. 861 (1997) (NJ payment bond not preempted).

[8] *Carpenters Local Union No. 26 v. United States Fidelity & Guar. Co.*, 215 F.3d 136 (1st Cir. 2000) (Mass. payment bond not preempted),

The effort to distinguish these contrary cases and other laws is without merit, however. The laws at issue here are just an example of similar laws of general application in virtually all fifty states, which all have the same purpose (guaranteeing payment of labor and materials on construction projects) and origins (in the mechanic lien statutes). There is no difference between the operation of these laws which would have any bearing on whether they should be preempted by ERISA.

All of these laws trace their origins to state mechanic lien laws, the first of which were enacted over two centuries ago.[9] This remedy allows workers who have not been paid for their labor to recover payment from the property they labored on, by way of a lien. Black's Law Dictionary 4th Ed., at 1132 (West 1957). These laws reflect a solicitude for the full and prompt payment of workers, which has historically been a matter of state concern. *See Livados v. Bradshaw*, 512 U.S. 107, 123-25, 114 S. Ct. 2068, 129 L. Ed. 2d 93 (1994) (CA statute requiring prompt payment of wages on termination was among non-negotiable rights traditionally conferred on employees by state law).

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overruling Williams v. Ashland Engineering Co., 45 F.3d 588 (1st Cir.), *cert. denied*, 516 U.S. 1011 (1995); *Trustees for Michigan Laborers Health Care Fund v. Seaboard Surety Co.*, 137 F.3d 427 (6th Cir. 1998) (MI payment bond not preempted); *Bleiler v. Cristwood Constr., Inc.*, 75 F.3d 13 (2d Cir. 1995) (Conn. Payment Bond not preempted); *Ragan v. Tri-County*, 62 F.3d 501 (3d Cir. 1995) (PA payment bond not preempted).

[9] Maryland passed a mechanic lien law in 1791. 2 Kilty's Laws of Md., Act 1791, ch. 45, § 10. Congress passed one for the District of Columbia in 1833. 4 Stat. 659 (March 2, 1833). *See Winder v. Caldwell*, 55 U.S. 434, 14 L.Ed. 487 (1852). For a description of the agitation by early workers' associations for such laws, *see* Philip S. Foner, *History of the Labor Movement in the United States, Vol. 1: From Colonial Times to the Founding of the American Federation of Labor*, at 124 (Int'l Pub. 1947).

In the Western States, mechanic lien laws are as old as the states themselves. California passed a mechanic lien law in its first legislative session in 1850. 1850 Cal. Stat. 211-13, ch. 87 §§ 1-4; *see generally* Sackman, *Lien On: The Story of the Elimination and Return of Mechanic Lien, Stop Notice and Bond Remedies for Collection of Contributions to Employee Benefit Funds*, 20 Berk. J. Emp. & Lab. L. 254-85 (1999).[10] Washington passed its first mechanic lien law while it was still a territory, Code Wash. T. § 1957 (1881), and codified it upon achieving statehood. *See Spokane Mfg. & Lumber Co. v. McChesney*, 1 Wash. 609, 21 P. 198 (1889) (upholding constitutionality of Washington mechanic lien law).

Because a lien could not be placed upon public property, the remedies of stop notices and payment bonds were developed to provide laborers the same protections on public works. *See Hall & Olswang v. Aetna Casualty & Surety Co.*, 161 Wash. 38, 47, 296 P. 162 (1931); *Clark v. Beyrle*, 160 Cal. 306, 311, 116 P. 739 (1911); *see generally Lien On*, at 257-59. The Washington payment bond statute at issue here was passed in its first legislature, Wash. Stat. 1888 p. 15 § 1, and the stop notice law dates back to at least 1921, Wash. Stat. 1921 ch. 166 § 1.

What is here referred to as a "stop notice" law, is a requirement that the project owner (whether private or public) withhold, after notice, a portion of the contract price to guarantee any unpaid labor or material claims on the job. RCW § 60.28.010; *see also* Calif. Civ. Code § 3181. What is here referred to as a "payment bond" law is one which requires a bond or surety to be posted (usually by the general contractor) to similarly guarantee payment of all labor and materials on the job. RCW § 39.08.010; *see also* Calif. Civ. Code § 3247. While these remedies may be referred to by

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[10] Hereafter "Lien On."

different names, we use this terminology here for consistency, and to demonstrate the similarity of these remedies.[11] Regardless of the terminology or the procedural requirements of these statutes, they all serve the same purpose: to provide a third-party guarantee for the payment of labor and materials on construction jobs, whether by the property itself, the funds allocated for construction, or a mandatory bond.

In 1957, this Court was faced with the question of whether the protection of labor on federal projects included contributions to fringe benefit funds under the Miller Act.[12] This Court held that it did. *U.S. ex. rel. Sherman v. Carter*, 353 U.S. 210, 77 S.Ct. 793, 1 L.Ed.2d 776 (1957). That decision was based on the observation that the trustees of these funds stood as assignees in the shoes of the laborers who allocated part of their pay for these benefits, and thus should be able to enforce the bond rights as would any other assignee. *Id.* at 218-19.

Like the federal courts, the courts of Washington have long held that labor claims under their bond and lien laws may be asserted by an assignee. *See Maryland Casualty Co. v. Philbrick & Nicholson*, 147 Wash. 277, 266 P. 142 (1928).

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[11] For example, stop notice laws are often referred to as "lien" laws, because they essentially place a "lien" on the funds (rather than the property) allocated for the project. *See, e.g. Plumbing Industry Board v. E.W. Howell Co.*, 126 F.3d 61 (2d Cir. 1997) (holding NY "Lien" Law, for withholding unpaid labor on public works, preempted by ERISA); *but see Alibrandi Building Systems, Inc. v. Wm. C. Pahl Construction Co.*, 187 A.D.2d 957, 590 N.Y.S.2d 370 (1992) (holding another provision of the same NY "Lien" Law *not* preempted).

[12] 40 U.S.C. § 270a. As with the state laws, the purpose of the federal law "was to provide security for the payment of all persons who provide labor or material on public work . . . by giving a claim under the bond in lieu of the lien upon land and buildings customary where property is owned by private persons." *Illinois Surety Co. v. John Davis Co.*, 244 U.S. 376, 380, 37 S.Ct. 614, 61 L.Ed. 1206 (1917).

Thus, like many other states,[13] Washington applied this Court's decision in *Carter* to its own laws, and held that wages assigned to fringe benefit funds were protected by state bond and lien laws. *Crabtree v. Lewis*, 86 Wash.2d 282, 544 P.2d 10 (1975).

Some states then codified these decisions into their statutes, including trust funds among those who may assert these remedies.[14] Others, like Washington and Arizona, left this a matter of court interpretation of the statute.[15] While some courts have seized upon this distinction as relevant to preemption, the definition of "state law" in ERISA § 514(c)(1), 29 U.S.C. § 1144(c)(1) makes clear that state decisional and legislative law are treated equally for preemption purposes. *See Jones v. Roth Packing Co.*, 430 U.S. 519, 526, 97 S.Ct. 1305, 51 L.Ed.2d 604 (1977) (preemption turns on "the relationship between state and federal laws as they are interpreted and applied, not merely as they are written.")

The importance of these remedies to employee benefit funds cannot be understated. The U.S. Census Bureau reports over Fifteen Billion Dollars paid annually for voluntary fringe benefits in the construction industry. U.S. Census Bureau, *1997 Economic Census, Construction—Geographic Area Summary*, Table 3 at 9 (April 2000). Applying the ratio of

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[13] *See, e.g., Arizona Laborers, Teamsters and Cement Masons Local 395 Health and Welfare Trust Fund v. New Pueblo Constructors, Inc.*, 131 Ariz. 278, 279, 640 P.2d 209, 210 (1982); *Trustees of Florida West v. Quality Concrete*, 385 So.2d 1163, 1165 (Fla. App. 1980); *Tobler v. Oliver Constr. Co.*, 442 P.2d 904, 907 (Nev. 1968); *Bernard v. Indemnity Ins. Co.*, 162 Cal.App.2d 479, 487, 329 P.2d 57 (1958).

[14] *See, e.g.*, Calif. Civ. Code § 3111.

[15] While Washington did not amend the bond and stop notice statutes at issue here to refer to fringe benefits, the definition of "labor" for purposes of mechanic liens has been amended to include fringe benefit contributions. RCW §§ 60.04.011(4) and (7).

delinquent over paid contributions (8.19%) of one of his larger clients to this data, this author estimated the loss of delinquent contributions nationally to be over a Billion Dollars. *Lien On*, at 282 n. 185.

The laws at issue here are essentially creditors' remedies.[16] The issue presented by this petition is whether ERISA benefit contributions are to be excluded from these remedies, as found by the court below. This Court has noted "the uniquely temporary, transitory, and sometimes seasonal nature of much of the employment in the construction industry." *Jim McNeff, Inc. v. Todd*, 461 U.S. 260, 266, 103 S.Ct. 1753, 75 L.Ed.2d 830 (1983). Employers can be as transitory as employment in this industry, often leaving behind unpaid workers. This was the original impetus for these state laws two centuries ago. They are just as important today. "In the construction industry, employees receive more of their compensation in the form of retirement and savings benefits than in any other industry." U.S. Dept. of Labor, *The Editor's Desk: Importance of Retirement Benefits in Compensation*, Monthly Labor Review (8/2/1999). The exclusion of fringe benefits from these creditor remedies has had a devastating effect on the ability to actually collect contributions, and we would argue that this discrimination in creditor remedies should *itself* be held preempted. *See Lien On*, at 283-85.

II. THE CIRCUIT COURTS AND HIGH COURTS OF VARIOUS STATES HAVE SPLIT OVER WHETHER THESE STATE LAW REMEDIES ARE PREEMPTED BY ERISA.

On this vital issue of whether fringe benefits are to be protected on the same basis as other compensation, or

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[16] *See Connolly Development, Inc. v. Superior Court*, 17 Cal.3d 803, 808, 132 Cal.Rptr. 477, 55 P.2d 637 (1976) (noting that in California, mechanic liens are the only "creditors' remedy" accorded Constitutional status).

whether ERISA funds are to be treated as second-class creditors, the courts have split every which way. The Circuit Courts of Appeals have disagreed with each other.[17] The highest courts of the states have disagreed with each other on this federal question.[18] The highest courts of the states have disagreed with Circuit Courts of Appeal.[19] The same court has even come to contrary conclusions over this same issue.[20]

As to each of these remedies, appellate courts are divided. There are conflicting decisions holding mechanic liens preempted[21] and not preempted,[22] holding stop notices

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[17] *Compare, e.g., Carpenters Local Union No. 26, supra* (1st Cir.: Mass. payment bond *not* preempted), *with Plumbing Industry Board, supra* (2d Cir.: NY Stop Notice preempted).

[18] *Compare, e.g., Hawaii Laborers Trust Funds v. Maui Prince Hotel.*, 81 Hawaii 487, 918 P.2d 1143 (1996), *cert. denied*, 521 U.S. 1119 (1997) (HI mechanic lien *not* preempted), *with Carpenters Southern California Administrative Corp. v. El Capitan Development Co.*, 53 Cal.3d 1041, 282 Cal.Rptr. 277, 811 P.2d 296, *cert. denied*, 502 U.S. 963 (1991) (CA mechanic lien preempted).

[19] *Compare, e.g., Trig, supra* (Wash. payment bond preempted), *with Carpenters Local Union No. 26, supra* (1st Cir.: Mass. payment bond *not* preempted).

[20] *Compare, e.g., JWJ Contracting Co., supra* (9th Cir.: AZ Payment Bond *not* preempted), *with Carpenters Health & Welfare Trust for California v. Tri-Capital Corp.*, 25 F.3d 849, 853-54 (9th Cir.), *cert. denied*, 513 U.S. 1018 (1994) (CA Stop Notice preempted).

[21] *McCoy v. Massachusetts Institute of Technology*, 950 F.2d 13 (1st Cir. 1991), *cert. denied*, 504 U.S. 910 (1992) (MA mechanic lien); *Iron Workers Mid-South Pension Fund v. Terotechnology Corp.*, 891 F.2d 548 (5th Cir.), *cert. denied*, 497 U.S. 1024 (1990) (LA mechanic lien); *Faeth v. ACA Environmental Sevkos, Inc.*, 172 Misc.2d 453, 659 N.Y.S.2d 683 (1997) (NY mechanic lien); *Sturgis v. Herman Miller, Inc.*, 943 F.2d 1127, 1129 (9th Cir. 1991) (CA mechanic lien); *El Capitan Development Co., supra* (CA mechanic lien); *Edwards v. Bethlehem Steel Corp.*, 554 N.E.2d 833 (Ind. Ct. App. 1990) (Ind. Mechanic Lien).

[22] *IBEW Local No. 48 v. Oregon Steel Mills, Inc.*, 168 Ore. App. 101, 5 P.3d 1122 (2000) (OR Mechanic Lien); *Bellemead Development v. New*

preempted,[23] and not preempted,[24] and holding payment bonds preempted,[25] and not preempted.[26] While the general trend of these cases has been *away* from preemption, the divided opinion in this case shows that the trend is not uniform. The courts remain deeply divided over the issue.

The issue in all of these cases should be the same: whether a creditor remedy to guarantee all labor costs is preempted by ERISA if it includes fringe benefits in the value of labor protected. Only this Court can resolve the split over this issue.

Jersey Council of Carpenters Benefit Funds, 11 F.Supp.2d 500 (D.N.J. 1998) (NJ mechanic lien); *Hawaii Laborers Trust Funds, supra* (HI mechanic lien); *Plumbers Local 458 Holiday Vacation Fund v. Immel*, 151 Wis.2d 233, 445 N.W.2d 43 (Wis. App. 1989) (Wis. mechanic lien).

[23] *Trig, supra* (Wash. stop notice); *Plumbing Industry Board, supra* (NY Stop Notice); *Tri-Capital Corp., supra* (CA Stop Notice); *Bricklayers & Allied Craftsmen Local 33 Benefit Funds v. America's Marble Source*, 950 F.2d 114 (3rd Cir. 1991) (NJ Stop Notice).

[24] *In Re Coyne Electrical Contractors, Inc.*, 244 B.R. 245 (B.C. S.D.N.Y. 2000) (NY "Lien Law" on trust assets held by contractor); *Alibrandi Building Systems, Inc. v. Wm. C. Pahl Construction Co.*, 187 A.D.2d 957, 590 N.Y.S.2d 370 (1992) (NY stop notice).

[25] *Trig Electric, supra* (Wash. payment bond); *Williams v. Ashland Engineering Co.*, 45 F.3d 588 (1st Cir.), *cert. denied*, 516 U.S. 1011 (1995) (Mass. payment bond); *Operating Engineers Pension Trust v. Insurance Company of the West*, 35 Cal.App.4th 59, 66-67, 42 Cal.Rptr.2d 1, *cert. denied*, 516 U.S. 1011 (1995) (CA Payment Bond).

[26] *Carpenters Local Union No. 26, supra* (Mass. payment bond); *Trustees for Michigan Laborers Health Care Fund v. Seaboard Surety Co.*, 137 F.3d 427 (6th Cir. 1998) (MI payment bond); *JWJ Contracting Co., supra* (AZ Payment Bond); *Bleiler v. Cristwood Constr. , Inc.*, 75 F.3d 13 (2d Cir. 1995) (Conn. Payment Bond); *Greenblatt v. Delta Plumbing Corp.*, 68 F.3d 561 (2d Cir. 1995) (NY surety bond); *Ragan v. Tri-County*, 62 F.3d 501 (3d Cir. 1995) (PA payment bond); *L.B.S. Construction Co., supra* (NJ payment bond); *Seaboard Surety Co. v. Indiana State District Council of Laborers and Hod Carriers Health and Welfare Fund*, 645 N.E.2d 1121 (Ind. 1995) (Ind. Payment Bond); *Alibrandi, supra* (NY Payment Bond).

III. THE CONFUSION AMONG THE CIRCUITS AND STATE COURTS CAN ONLY BE RESOLVED IF THIS COURT CLARIFIES ITS ERISA PREEMPTION ANALYSIS

The confusion among the Circuit and State courts is the result of their formulistic application of language from this Court's decisions, which can only be corrected by a clarification of that language by this Court. We do not urge overturning or even questioning any of those decisions, but rather that this court announce a return to the traditional analysis of "field" and "conflict" preemption, which is what we believe Congress intended.

Preemption derives from the "Supremacy Clause" of the Constitution. U.S. Const., Article VI, cl. 2. But the power of Congress to preempt state law can be no greater than its power to legislate in the first place. "Within the scope of its powers, as enumerated and defined, it [federal law] is supreme and above the States, but beyond, it has no existence." *U.S. v. Cruikshank*, 92 U.S. 542, 550, 23 L.Ed. 588, 590 (1876).

Originally, this Court described ERISA preemption in broad terms, as reaching any state law which "relate[s] to" ERISA plans "in the normal sense of the phrase." *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85, 97, 103 S.Ct. 2890, 77 L.Ed.2d 490 (1983). Taken to its logical limit, this construction would call for preemption of state law beyond the Constitutional power of Congress, "since, as many a curbstone philosopher has observed, everything is related to everything else." *California Division of Labor Standards Enforcement v. Dillingham Construction, Inc.*, 519 U.S. 316, 335, 117 S.Ct. 832, 136 L.Ed. 2d 791 (1997) (Scalia, J., concurring).

While this Court has abandoned the metaphysical "relate to" approach, the alternative formulation of "reference to" or

"connection with" has been no more helpful. "For the same reasons that infinite relations cannot be the measure of pre-emption, neither can infinite connections." *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Insurance Co.*, 514 U.S. 645, 656, 115 S.Ct. 1671, 131 L.Ed. 2d 695 (1995).

In particular, the formulistic application of the "alternative enforcement mechanism" language (or "alternative funding mechanism" as the Washington Supreme Court put it) [27] has been responsible for the incorrectly-decided cases cited above. That language comes from this Court's decision in *Pilot Life Insurance v. Dedeaux* 481 U.S. 41, 107 S.Ct. 1549, 95 L.Ed. 2d. 39 (1987). The Court there held that the *benefit* enforcement provisions of ERISA were meant by Congress to be exclusive, in the same manner that the balance of weapons and defenses in labor relations was meant to be exclusive under the Labor Management Relations Act (LMRA) § 301(a), 29 U.S.C. § 185(a). 481 U.S. at 55-56. Indeed, Congress specifically referred to the broad sweep of preemption under the LMRA in discussing these benefit enforcement provisions in the original enactment of ERISA. H.R. Conf. Rep. No. 93-1280, p. 327 (1974). Thus, the *Pilot Life* line of cases can be explained as applying the familiar "field" preemption developed under the LMRA, *see, e.g. Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 105 S.Ct. 1904, 85 L.Ed.2d 206 (1985), to benefit enforcement actions under ERISA.

Yet the thoughtless recitation of the "alternate enforcement mechanism" formula, as here, without looking at its origins and reasons, has created absurd results. The Washington Supreme Court, and other courts following the same

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[27] *Trig*, 13 P.3d 622, 627. Taken to its logical extreme, any legal action by an ERISA fund to collect a debt, such as rent on property it owned, could be called an "alternative funding mechanism" and thus preempted.

formula,[28] have ignored the fact that there was no enforcement mechanism for delinquent contributions in the original enactment of ERISA. Pub. L. 93-406, 88 Stat. 832 (1974).[29] That is not to say that Congress had not occupied the field. For over two decades before the enactment of ERISA, actions to collect delinquent contributions were brought under the LMRA, 29 U.S.C. § 185(a), as actions to enforce a collective bargaining agreement. *See, e.g. Lewis v. Benedict Coal Corp.*, 361 U.S. 459, 465-71, 80 S.Ct. 489, 4 L.Ed.2d 442 (1960). Yet in those two decades under the LMRA, whose broad sweep of preemption was the model for ERISA, there is no published decision holding these remedies to be preempted.

It was not until the Multi-Employer Pension Plan Amendments Act (MEPPA) of 1980 [30] that an "enforcement mechanism" for delinquent contributions was added to ERISA. By creating an explicit ERISA cause of action for delinquent contributions, did Congress mean that state remedies would now be preempted by ERISA, when they had not been preempted under the LMRA? The intent of Congress in this regard was clearly stated: "The Committee Amendment does not change any other type of remedy [other than attorney fees and liquidated damages] permitted under state or federal law with respect to delinquent contributions." H.R. Rep. No. 96-869, part 2, at 49, *reprinted in* 1980 U.S.C.C.A.N. 2993, 3038.

The "alternative enforcement mechanism" holding of *Pilot Life* was solidly grounded in an analysis of Congressional intent. 481 U.S. 41, 54-56. Yet the lower courts have simply peeled off this label and thoughtlessly applied it, without

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[28] *See, e.g., El Capitan, supra,* 53 Cal.3d 1041, 1052-53.

[29] *See Lien On,* 20 Berk. J. Emp. & Lab. L. 245, 262-66.

[30] Pub. L. No. 96-364, 94 Stat. 1209. Specifically, these amendments added what is now 29 U.S.C. §§ 1132(g)(2) and 1145.

looking at the Congressional intent as this Court originally did. For this reason, we believe that the Court needs to clarify its preemption analysis, and direct the lower courts away from applying simple labels and formulas. Instead, we urge that the Court adopt the suggestion in the *Dillingham* concurrence to "apply ordinary field pre-emption, and, of course, ordinary conflict pre-emption." *Dillingham*, 519 U.S. 316, 336 (Scalia, J., concurring). This should direct the lower courts back to an analysis of the intent of Congress and the actual effect of the state laws in question on the intended purpose of ERISA.

CONCLUSION

This split decision by the Washington Supreme Court adds to the existing confusion and conflict among Circuit and State courts over whether state guarantees of labor on construction jobs are preempted when they include fringe benefits governed by ERISA. This confusion casts doubt on the ability to collect up to a Billion dollars annually in delinquent contributions, jeopardizing the benefits of millions of construction workers and their families. Now is the time to take the issue up and resolve this split over a vital question of remedies to guarantee that workers will see the benefits promised them for their labor.

This is also the opportunity to cast aside the labels and formulas which have taken preemption analysis away from the cornerstone of Congressional intent and brought it perilously close to a usurpation of power which Congress never intended. All things on this Earth must have their measure and their limit, even ERISA preemption. The Petition should be granted.

Respectfully submitted,

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